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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ST. MONICA DEVELOPMENT
COMPANY,

Plaintiff and Respondent,

v.

SHEPPARD, MULLIN, RICHTER &
HAMPTON,

Defendant and Appellant.

B198401

(Los Angeles County
Super. Ct. No. SC091644)

APPEAL from orders of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed.

Sheppard Mullin Richter & Hampton, Candace L. Matson, D. Ronald Ryland and Olivier F. Theard for Defendant and Appellant.

Jonathan Stein for Plaintiff and Respondent.

St. Monica Development Company, LLC (SMDC) filed a complaint against an alleged creditor, and the creditor's lawyers, Sheppard, Mullin, Richter & Hampton, LLP (Sheppard). Sheppard filed an "anti-SLAPP" motion to strike the causes of action in which it was a named defendant (see Code Civ. Proc., § 425.16), and a demurrer based on the attorney-client civil conspiracy statute (see Civ. Code, § 1714.10). The trial court denied Sheppard's special motion to strike and overruled its demurrer. We affirm.¹

FACTS

SMDC's Complaint

SMDC's complaint alleges the following facts. In February 2001, SMDC entered into a written "Development Agreement" with the Gabrielino-Tongva Tribe. The agreement contained two key provisions: SMDC would perform "Economic Development Tasks," which the Tribe needed to open and operate casinos; and the Tribe would pay SMDC a monthly amount of \$25,000 for its services, plus a percentage of specified revenues from casinos that the Tribe established. In October 2006, the Tribe terminated the agreement. The Tribe owes more than \$2.4 million to SMDC under the agreement.

SMDC's complaint names Sheppard (and other defendants) in a sixth cause of action for fraudulent conveyance and a seventh cause of action for "negligence," which actually sounds more in a claim for breach of the lawyer's duty of loyalty. Both causes of action are based on the following allegations: In September 2006, SMDC consulted with Sheppard regarding the agreement between SMDC and the Tribe, the Tribe's termination of the agreement, and SMDC's claims that the Tribe had breached the agreement. During the course of their meetings and consultations, Sheppard obtained confidential information from SMDC. Despite obtaining confidential information from SMDC, Sheppard agreed to represent the Tribe in connection with the disputes between SMDC and the Tribe. Sheppard revealed confidential information and attorney-client

¹ All references to section 425.16 are to that section of the Code of Civil Procedure. All references to section 1714.10 are to that section of the Civil Code.

communications, which it obtained from SMDC. Sheppard received money from the Tribe, which the Tribe transferred out of its coffers to avoid its creditors.

Sheppard's Special Motion to Strike and Sheppard's Demurrer

Sheppard filed a special motion to strike SMDC's sixth cause of action for fraudulent conveyance and seventh cause of action for negligence under the anti-SLAPP statute. (§ 425.16.) Sheppard's motion argued that the causes of action were based on Sheppard's role as the Tribe's lawyers, and, as such, arose out of Sheppard's acts in furtherance of its rights of petition and free speech. In more specific terms, Sheppard argued that SMDC filed its complaint against Sheppard in response to a lawsuit, which Sheppard filed on behalf of the Tribe in November 2006, and that SMDC's complaint was an attempt to create a conflict between Sheppard and the Tribe, requiring Sheppard to withdraw as the Tribe's counsel of record.

Sheppard's demurrer argued (among various other grounds) that SMDC's causes of action for fraudulent conveyance and negligence against Sheppard were "founded upon allegations of a conspiracy between Sheppard . . . and [the Tribe]," and, therefore, required SMDC to allege compliance with section 1714.10. In other words, Sheppard argued that SMDC's complaint was fatally flawed because it did not allege that SMDC had obtained a prefiling order from the trial court authorizing SMDC to allege a cause of action against Sheppard.

The Trial Court's Order

On April 3, 2007, the trial court denied Sheppard's special motion to strike on the ground that Sheppard had not carried its burden of showing that SMDC's causes of action for fraudulent conveyance and negligence arise from an act protected by the anti-SLAPP statute. The trial court overruled Sheppard's demurrer on the ground that SMDC's claims against Sheppard fell within the exceptions to section 1714.10's requirement that a party obtain a prefiling court order before naming a lawyer in a cause of action with his or her client.

DISCUSSION

I. The Anti-SLAPP Motion

A. The Fraudulent Conveyance Cause of Action

Sheppard contends the order denying its anti-SLAPP motion must be reversed as to SMDC's sixth cause of action for fraudulent conveyance because: (1) it is undisputed that Sheppard did no more than accept a \$300,000 retainer from the Tribe; and (2) a lawyer's receipt of a retainer is "protected activity" within the meaning of the anti-SLAPP statute.

For its part, SMDC acknowledges that the trial court did not "divine a separate gravamen for each [of its causes of] action," but argues that, since "switching sides" by a lawyer is not protected activity within the purview of the anti-SLAPP statute, then it must follow that "taking money to switch sides" is similarly not protected by the anti-SLAPP statute.

Neither party has offered us a single legal citation in support of their respective positions on the question of whether a transfer of money in the form of a retainer between a lawyer and a client may support a fraudulent conveyance claim.

Writing on a clean slate, we view SMDC's sixth cause of action for fraudulent conveyance and seventh cause of action for negligence to be tethered together and, for that reason, determine that, as goes the latter, so goes the former. In other words, if Sheppard should not have represented the Tribe (an issue we address in the next section of this opinion), then perhaps, Sheppard should not have accepted money from the Tribe, and, perhaps, SMDC may have some recourse to recover the money to satisfy the Tribe's debt.² Sheppard's argument is interesting, but we remain unconvinced that the denial of its anti-SLAPP motion should be reversed in part. Although SMDC appears to have a long, long way to go to establish a fraudulent transfer claim, we are willing, in the

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All of this, of course, is predicated on SMDC's ability to prove that a debt actually existed at the time of the Tribe's transfer of money to Sheppard, and that the Tribe transferred the money to Sheppard for the purpose of avoiding the Tribe's creditors.

context of Sheppard’s anti-SLAPP motion, to accept SMDC’s proposition that our focus should be on the overriding allegation that Sheppard acted wrongly when it chose to represent the Tribe.

B. The Negligence Cause of Action

In a series of interrelated arguments, Sheppard contends the order denying its anti-SLAPP motion must be reversed as to SMDC’s cause of action for negligence because the acts which Sheppard allegedly committed fall under the protective umbrella of the anti-SLAPP statute. We disagree.

1. The trial court’s ruling

The trial court denied Sheppard’s anti-SLAPP motion for the following reasons: First, the court found that allegations of SMDC’s complaint — to the effect that Sheppard “jumped ship” on SMDC — took the challenged causes of action out of the purview of the anti-SLAPP statute. In other words, the court found that the gravamen of SMDC’s claims did not arise from Sheppard’s acts in furtherance of its rights of petition or free speech, but from alleged conduct by which Sheppard breached its duties of loyalty and confidentiality to an alleged former client, SMDC.

Second, the court found that it might be correct, as Sheppard asserted, that SMDC had “manufactured” its claims against Sheppard solely to create a conflict between the law firm and the Tribe in the underlying litigation. At the same time, however, the court determined that such an assertion required an assessment of credibility, which was not proper in the context of Sheppard’s anti-SLAPP motion.

In summary, the trial court determined that SMDC had alleged a cognizable claim for breach of the duty of loyalty against Sheppard, and, against that claim, Sheppard had not carried its burden of showing that the claim actually arose from Sheppard’s protected activity, rather than from the alleged breach of the duty of loyalty.

Sheppard’s arguments on appeal have not persuaded us to assign error to the trial court’s denial of Sheppard’s anti-SLAPP motion. On the contrary, we agree with the trial court that SMDC’s claim against Sheppard for breach of the duty of loyalty is sufficient to survive Sheppard’s anti-SLAPP motion, and we agree with the court that *Benasra v.*

Mitchell Silberberg & Knupp LLP (2004) 123 Cal.App.4th 1179 (*Benasra*) supports such a conclusion.

2. The *Benasra* case

Benasra arose from a licensing agreement between Guess, Inc., and Pour Le Bebe, Inc. (PLB). At some point, the parties' relationship soured, and, in 1999, Guess initiated an arbitration against PLB. During a period of time before Guess initiated the arbitration, Mitchell, Silberberg & Knupp (MS&K) had represented PLB "in a few legal matters," including immigration work for PLB's principals. Notwithstanding its prior relationship with PLB, MS&K agreed to (and did) represent Guess in connection with the arbitration. PLB filed a motion asking the arbitration panel to disqualify MS&K, but the panel denied the motion. PLB then filed a civil action against MS&K for breach of the duty of loyalty. (*Benasra, supra*, 123 Cal.App.4th at p. 1182, fn. 2; see also *Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 99.)

MS&K filed a special motion to strike PLB's complaint under the anti-SLAPP statute, arguing that the law firm's representation of Guess in the arbitration was an act in furtherance of the firm's rights of petition or free speech. MS&K supported its motion with evidence showing that it did not represent PLB at the time of the Guess arbitration, and that there was no substantial relationship between the matters in which it formerly represented PLB and the Guess arbitration. MS&K argued that PLB had to prove that MS&K actually disclosed confidential information, and that those disclosures actually caused damage to PLB by changing the outcome of the Guess arbitration.

In opposition to the anti-SLAPP motion, PLB presented evidence showing that MS&K had begun representing Guess in the arbitration while it was still doing work for PLB. PLB further showed that an MS&K lawyer had cross-examined PLB's principal during the Guess arbitration about housekeepers, drivers, and girlfriends who were allegedly on PLB's payroll, and about other personal matters, all in an effort to establish a connection between the principal's personal expenses and PLB's problems in paying royalties to Guess. PLB argued that MS&K had made an issue of the personal life of

PLB's principal in the arbitration, and that MS&K had learned that information in the course of the law firm's role as PLB's lawyers.

The trial court granted MS&K's special motion to strike on the ground that PLB was seeking to impose liability on the law firm based on their representation of a client in an arbitration proceeding.

Division Four of our court reversed the trial court's ruling in an opinion, which may be viewed as comprised of three main points. As an initial matter, Division Four concluded that a moving defendant's burden to show that a cause of action arises from a protected act is not met simply by showing that the *label* of the lawsuit appears to involve the rights of free speech or petition, but rather, the defendant must demonstrate that the *substance* of the plaintiff's cause of action was based on an act in furtherance of the right of petition or free speech. (*Benasra, supra*, 123 Cal.App.4th at p. 1186, citing *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630.)

Division Four then examined the principles involved in a claim for breach of the duty of loyalty, explaining that "the actual disclosure of confidences by a former attorney during litigation is not required to form the basis for the tort of breach of duty of loyalty. The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client. . . . In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached the duty of loyalty. The breach of [the] . . . duty lawsuit may follow litigation pursued against the former client, but does not arise from it. Evidence that confidential information was actually used against the former client in litigation would help support damages, but is not the basis for the claim. As [PLB] so aptly put it, their claim is not based on 'filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client.' " (*Benasra, supra*, 123 Cal.App.4th at p. 1189, discussing *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017.)

Finally, Division Four examined the substance of the cause of action challenged by MS&K, and rejected the law firm's assertion that it had been made by a defendant based upon written or oral statements that it had made on behalf of Guess in the arbitration. As Division Four explained, MS&K's contention that the claims against them were based on written or oral statements made on Guess's behalf in the arbitration was "not accurate." On the contrary, said Division Four, PLB's claims were based on allegations that MS&K had violated the State Bar Rules of Professional Conduct by accepting employment adverse to a former client, PLB, without PLB's consent, and by exploiting confidential information obtained from PLB.

3. Sheppard's alleged breach is not "protected activity"

We see no meaningful or material difference between the predicament into which MS&K placed itself in *Benasra*, and the predicament into which Sheppard allegedly placed itself in SMDC's current case, and we see no reason to apply the anti-SLAPP statute in SMDC's current case differently than it was applied in *Benasra*. In other words, we agree with the trial court that "jumping ship" by a lawyer, i.e., an act in breach of the duty of loyalty, is not protected activity within the meaning of the anti-SLAPP statute. The bottom line is that a lawyer should not listen to one party's confidential communications, and then turn around and represent an adverse party. Sheppard's showing in connection with its anti-SLAPP motion did not take Sheppard out of this scenario.

II. The Demurrer

As noted above, Sheppard filed a demurrer to SMDC's complaint on the ground that SMDC did not allege that it had complied with section 1714.10. The trial court overruled Sheppard's demurrer. Sheppard contends the trial court should have sustained its demurrer in accord with section 1714.10. We disagree.

A. Section 1714.10

Section 1714.10, subdivision (a), provides that “[n]o cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney’s representation of the client, shall be included in a complaint . . . unless the court enters an order allowing the [cause of action] to be filed after the court determines that the party seeking to file the [cause of action] has established that there is a reasonable probability that the party will prevail in the action.” Section 1714.10, subdivision (c), provides an exception: “This section shall not apply to a cause of action against an attorney . . . where . . . the attorney has an independent legal duty to the plaintiff”

B. The Cause of Action Was Exempt

We agree with the trial court that SMDC’s cause of action for a breach of the duty of loyalty against Sheppard alleges a breach of an independent legal duty owed by Sheppard to SMDC, and is not, at its most fundamental level, based on a “conspiracy.”

Although Sheppard is correct that paragraph 10 of SMDC’s complaint includes an allegation that Sheppard acted as a “co-conspirator, or otherwise acted in concert . . . with every other defendant” (which, of course, includes its client, the Tribe), we note that this allegation is included in the complaint’s “boilerplate” material, and we agree with the trial court that Sheppard largely “ignore[s] material allegations of [SMDC’s] complaint.” As we discussed above, the SMDC’s complaint alleges a sufficient claim for breach of the duty of loyalty. The fundamental and overriding claim made by SMDC is that it sat down with Sheppard and provided confidential information about the disputes between SMDC and the Tribe, and that Sheppard then represented the Tribe in litigation involving those disputes. No more is needed to state a claim for breach of loyalty. (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, supra*, 96 Cal.App.4th 1017.)

We agree with the trial court that SMDC’s claim involves an alleged violation of the duty of loyalty owed directly by Sheppard to SMDC, and that this exempts SMDC’s claim from section 1714.10’s requirements for a prefiling order approving a conspiracy claim against a lawyer. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 394.)

DISPOSITION

The trial court's orders are affirmed. The parties are to bear their own costs on appeal.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.